Supreme Court, U.S.
FILED
04 416 SEP 9 - 2004
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Petition for Certiorari — Civil Case — Election Matter
No._____

IN THE

SUPREME COURT OF THE UNITED STATES

Terry Baum,
Petitioner

vs.

John Arntz,
Respondent

ON WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Request for temporary stay and immediate relief—ballot issue

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QUESTIONS PRESENTED FOR REVIEW

1. May an election scheme result in discarding a uniform class of voters that have substantially complied with the law, and their votes are easily discernable?
2. May directions of a voting scheme be non-obvious?
3. May the standard of determining the tabulation of a ballot be other than voter intent during a hand count?
4. May some votes be held to the standard of voter intent while other votes are held to the standard of technical compliance with the law?
5. May ballot instructions that are difficult to understand function as a literacy test?

LIST OF PARTIES IN COURT BELOW

1. Terry Baum, Petitioner

2. John Arntz, in his official capacity as acting director of elections, Respondent.

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Memorandum Re: Processing Write-In Votes,
Julia Moll Deputy City Attorney San Francisco,
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CITATIONS OF OPINIONS AND ORDERS IN CASE

San Francisco Deputy City Attorney Julia Moll wrote an opinion to Respondent that he must disregard 229 votes, as there was a technical non-compliance with the law by these voters; this opinion was not reported, but is set forth at pp. 17-24 of the appendix.

The original Order Denying Election Contest in the Superior Court of the State of California, County of San Francisco, Unlimited Civil Jurisdiction was not reported, but is set forth at pp. 25-29 of the Appendix.

The petition for writ of mandate/certiorari was summarily dismissed in the Court of Appeal of the State of California, First Appellate District, Division Two was not reported, but is set forth at pp. 30 of the Appendix.

The petition for review and request for emergency relief was denied in the Supreme Court of California, was not reported, but is set forth at pp. 31 of the Appendix.

JURISDICTIONAL STATEMENT

The judgment of the California Supreme Court was entered on August 25, 2004. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fourteenth Amendment, United States Constitution, provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws.
2. The 1965 Voting Rights Act. 42 U.S.C. § 1971 "

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS IN THE CASE NOW BEFORE THIS COURT

On, March 23, 2004 Deputy City Attorney Julia Moll wrote an opinion to Respondent that he must disregard 229 votes for Terry Baum, as there was a technical non-compliance with the law by these voters. Respondent adhered to this decision and stripped Terry Baum of the Green Party nomination for United States Representative.

On July 28, 2004, the Superior Court of California, County of San Francisco entered an order denying election contest, leaving Respondent's actions in place. A petition for writ of mandate/certiorari was summarily dismissed in the Court of Appeal of the State of California, First Appellate

District, Division Two. On August 11, 2004 in the Supreme Court of California a petition for writ of mandate was denied. On August 25, 2004 a petition for review and request for emergency relief was denied.

II. RELEVANT FACTS CONCERNING THE UNDERLYING ELECTIONS CONTEST

Ms. Baum was a certified write-in candidate for the Green Party nomination for United States Representative in the March 4, 2004 California Primary as per California Elections Code § 8600 and was thereby required to receive 1605 votes as per California Elections Code § 8605(a) to be declared the winner of the Green Party nomination for United States Representative.

The election was conducted on March 4, 2004 with ballots read by optical scanners, the Optec Eagle III P voting machine.

Ballots that could not be read by the Optec Eagle III P voting machine were remade[1] according to voter intent, as per

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[1]Ballots were "remade" by the San Francisco Department of Elections with the following actions, in public view:

A. The ballot is examined to see if it is in violation of the state's ballot secrecy statute. If there is an alleged violation the ballot is declared "challenged" and set aside. Otherwise the procedure continues.

B. The ballot is examined according to voter intent, and

California Elections Code § 15210.

An initial tabulation of votes showed 1430 votes for Ms. Baum.

The campaign manager then asked if it was possible that there were any ballots that had votes for Ms. Baum but were not counted. One random precinct was chosen and reviewed. It had three votes for non-qualified candidates, with none for Ms. Baum.

The Acting Director of Elections then ordered a recount of ballots that the machines had not automatically sorted as write-in votes; two hundred twenty-nine additional votes were located.

On March 15, 2004, the new total of 1659 votes was reported to Ms Baum, and verified to at least one reporter.

On March 22, 2004, 229 of votes were disqualified due to technical non-compliance with the law, specifically not connecting the arrow next to the name they wrote in.

On March 23, 2004, Deputy City Attorney Ms. Julia

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the voters intent is marked in red.

C. A new ballot of the same type as the defective ballot is selected.

D. Both ballots have unique trackable serial numbers allowing identification of when the ballot was remade, by whom, and allowing later comparison.

E. The new ballot is marked according to the red marks on the original ballot by a team that is independent of the party that made the red marks.

F. The new ballot is tabulated as if it were submitted by the voter.

Moll issued an opinion to Acting Director of Elections John Arntz that he had a legal obligation to disqualify all votes where the voters failed to connect the arrow next to the name they wrote in, as per California Elections Code § 15342(a), despite the fact that the elections department had universally agreed that these votes should be counted for Ms. Baum, and Deputy City Attorney Ms. Julia Moll declared in her opinion "... this result may seem contrary to both public policy and common sense."

III. EXISTENCE OF JURISDICTION BELOW

Petitioner filed an elections contest in the Superior Court of California, County of San Francisco, Unlimited Civil Jurisdiction. A writ of mandate/certiorari was filed in the Court of Appeal of the State of California, First Appellate District, as the matter was unappealable, and a writ of certiorari shall lie to contest an unappealable decision in California. A petition for review and request for emergency relief was duly filed in the Supreme Court of California.

IV. THE SUPREME COURT OF CALIFORNIA ERRED BY NOT REVIEWING THE WHOLESALE INVALIDATION OF A LARGE CLASS OF VOTERS IN A MANNER THAT CONFLICTS WITH FEDERAL GUIDANCE.

The stated policy in California with respect to elections is to freely allow casting and counting of write-in votes. The pertinent California Elections Code § 13(b)says:

> Nothing in this section shall be construed as preventing or prohibiting any qualified voter of this state from casting a ballot for any person by writing the name of that person on the ballot, or from having that ballot counted or tabulated, nor shall any provision of this section be construed as preventing or prohibiting any person from standing or campaigning for any elective office by means of a "write-in" campaign. However, nothing in this section shall be construed as an exception to the requirements of Section 15341.

and §15340:

> Each voter is entitled to write the name of any candidate for any public office, including that of President and Vice President of the United States, on the ballot of any election.

The Secretary of State has promulgated regulations which, likewise, require counting of write-in votes defective

in form: where the the office is incompletely indicated or missing entirely, California Administrative Code § 20102; where the candidate's name is misspelled or incomplete, California Administrative Code § 20103; or where both these deficiencies exist, California Administrative Code § 20104.

This has been extended by a ruling in the Supreme Court of California which states that attempts to write in candidates which are defective in form must be counted where the voter's intention can be ascertained:

> "If the intention of the voter with respect to voting for a write-in candidate is clearly expressed, the name written in need not be completely accurate in form, and the trial court has the right to take into consideration, in ascertaining the intention of the voter, the fact that the write-in candidate is an avowed aspirant for the office."
>
> *Muir v. Steinberg* (1961) 197 Cal.App.2d 264, 271.

These codes and rulings have been made, reducing the more onerous burdens of supporting a write-in candidacy. This has all occurred against a backdrop of the following United States Supreme Court rulings:

> "The right to vote freely for the candidate of

one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.

Reynolds v. Sims (1964) 377 U.S. 533, 555.

"The right to vote is protected in more than the initial allocation of the franchise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another . . . It must be remembered that 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.' . . . ."

Bush v. Gore (2000), 531 U.S. 98, 104-105.

"[T]he 'fundamental' nature of the right to vote and the importance of preserving the integrity of the franchise require that the judiciary give close scrutiny to laws imposing unequal burdens or granting unequal advantages in this realm."

Gould v. Grubb (1975) 14 Cal.3d 661, 670.

The totality of this legal construction leaves no doubt that debasement of suffrage is something that can not be made by a single snippet of legislation. The burden of a voting system on voters must be given serious consideration.

At first glance the added burden on voters in this case seems minimal. When using an optically-scanned ballot, a voter merely needs to connect an arrow, as well as writing in the name of the candidate. In practice, however, this added burden is significant. The problem is not the physical difficulty in connecting the arrow, but instead the burden of knowledge that one must connect the arrow. Although the directions on the ballot tell write-in voters to connect the arrows, it is clear that a significant percentage of voters either did not read or did not understand those directions. Over fourteen percent of the voters who attempted to vote for Ms. Baum failed to comply with the technical requirements. The burden of knowledge is thus obviously significant – and can be expected to be an even larger burden in places that have lower rates of literacy among the voters. This leads to the argument that the instructions were in fact a form of a literacy test regulated by 42 U.S.C. § 1971(a)(2)(C)(ii):

> a certified copy of the test and of the answers given by the individual is furnished to him within twenty-five days of the submission of his request made within the period of time during which

> records and papers are required to be retained and preserved pursuant to title III of the Civil Rights Act of 1960 (42 U.S.C. 1974 et seq.): Provided, however, That the Attorney General may enter into agreements with appropriate State or local authorities that preparation, conduct, and maintenance of such tests in accordance with the provisions of applicable State or local law, including such special provisions as are necessary in the preparation, conduct, and maintenance of such tests for persons who are blind or otherwise physically handicapped, meet the purposes of this subparagraph and constitute compliance therewith.

The applicability of this section is address by 42 U.S.C. §.1971(a)(3)(B):

> the phrase "literacy test" includes any test of the ability to read, write, understand, or interpret any matter.

42 U.S.C. §.1971(a)(2)(C)(ii) was dismissed from consideration by Respondent on the basis that the right to run as a write-in candidate is not constitutionally protected, and therefore none of the regulations could possibly be of interest to this Court.

We must balance this burden on the exercise of the right to vote against the state's interest in requiring that the arrow be connected. Clearly the interest is one of administrative convenience, when the machines have been set to recognize the existence of write-in votes only through a connected arrow.

Whether write-in votes can be detected or not, what is the administrative efficiency in invalidating unconnected-arrow ballots that are found when doing a hand count? The state's interest could instead easily be satisfied by a lesser burden on the right to vote – a requirement of a connected arrow in order for a write-in vote to be counted during a canvass by electronic machines that are incapable of recognizing a write-in vote without the connected arrow. The requirement would not apply to a manual canvass, when no administrative efficiency is achieved by disregarding ballots where voter intent is clear. This would make California Elections Code § 15342(a) consistent with California Elections Code § 15210.

Applying California Elections Code § 15342(a) to a hand count achieves an effect that is contrary to the legislative intent, as stated in section in California Election Code § 13(b), and reverses the numerous efforts by the legislature and courts to prevent debasement of suffrage, once granted. Even Respondent's counsel has conceded that the rule urged by the Respondent "may seem contrary to both public policy and common sense if ballots are invalidated

though voter intent is reasonably clear." March 23, 2003 Memorandum of Deputy City Attorney Julie Moll, p. 3[2].

V. THE SUPREME COURT OF CALIFORNIA ERRED IN AFFIRMING THAT BECAUSE THE RIGHT TO RUN AS A WRITE-IN CANDIDATE IS NOT A CONSTITUTIONALLY PROTECTED RIGHT, ANY RESTRICTIONS UPON THAT RIGHT ARE CONSTITUTIONALLY PERMISSIBLE.

The Superior Court of the State of California, ruled that ". . . the Supreme Court has held that a state may constitutionally ban write-in voting altogether. . . ." and draws the conclusion from this that "Where this is so, it cannot possibly offend the Constitution for Section 15342(a) to require voters to complete the arrow next to the name of a

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[2]Deputy City Attorney Julia Moll sites *Fair v. Hernandez* (1981) 116 Cal.App.3d 868 to justify her opinion. *Fair*, supra, turned on four ballots that varied so far from the norm that they were effectively in violation of the ballot secrecy part of California Elections Code § 15154, which disqualifies ballots with unique markings on them. In fact the four disputed ballots were further broken down into two broad categories by the Court, resulting in a declaration that "The deviation from the statutory scheme is here so considerable that the ballots cannot be saved." This is a far cry from discarding a uniform class of ballots that comprise fourteen percent of the votes counted for a candidate.

write-in candidate in the same manner they would if they were to vote for candidates whose names are pre-printed on the same ballot. Moreover, to the extent that such a ballot-marking requirement places any constituently cognizable burden whatsoever on the right to vote, it is amply justified by the State's need for efficient and uniform vote tabulation."

This premise is untenable: Many restrictive elections laws have been invalidated by the U.S, Supreme Court even though they involve activities the state does not have to authorize.

For example, there is no federal constitutional right of voters to propose legislation by initiative petition, but restrictions on such petitioning are subject to strict judicial scrutiny. See *Buckley v. American Constitutional Law Foundation*(1999) 525 U.S. 142 (among other things, invalidating requirement that petitioners be registered voters).

In the context of write-in votes, unreasonable restrictions have, similarly, been invalidated under strict scrutiny standards.

For example, in *Cartwright v. Carney* (1985) 690 So.2d 716, 720, a California state law invalidating write-in votes unless the voter wrote in "the full name of the person for whom the vote is cast, as the name appears in the Voter Registration of the person for whom the vote is cast" was held "unconstitutional on its face as an unreasonable and unjustified burden on the exercise of the franchise by anyone wishing to vote for a write-in candidate."

VI. THE QUESTIONS RAISED IN THIS ARE IMPORTANT AND UNRESOLVED.

The Supreme Court of California has decided important questions of federal law that have not been, but should be, settled by this Court and are a firm basis for granting certiorari in this case:

1 The foundation of The Superior Court's reasoning rested on the opinion in *Burdick v. Takushi*, (1992) 504 U.S. 428, which only addresses the right to run as a write-in, not the question of how to implement that right once granted.

2 The question of how to count ballots designed for machine tabulation, when those ballots are subject to a hand count is resolved in Washington State by relying on voter intent, *In Re Election of Medina City council Position 4*, (2003) Superior Court Wash. King County, No. 03-2-41-552-9SEA, while California resolves this by adhering to the technical specifications of the voting system, unless the ballot is defective beyond voter omission.

3 The petition presents the more fundamental question: Are there circumstances wherein a large percentage of ballots may be discarded as a class? The court has

always held that once the right of suffrage has been granted, all reasonable attempts must be made to respect that right.

CONCLUSION

The judgement below is a unique departure from decisions of this Court that require that election laws be interpreted in a manner that does not debase the right of suffrage, once granted. As such it breaches the Fourteenth Amendment and the decisions of this Court that were designed to protect the right of suffrage, once granted.

This petition for a writ of certiorari placing Terry Baum as the Green Party Nominee for U.S. Representative in California Congressional District Eight, should , therefore, be granted.

Dated: September 1, 2004

Respectfully submitted,

By:

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INDEX OF EXHIBITS

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MEMORANDUM

TO: JOHN ARNTZ, Director of Elections
FROM: JULIE MOLL, Deputy City Attorney
DATE: March 23, 2004
RE: Processing Write-In Votes

You requested advice concerning the processing of write-in votes where the voter's intent is clear but where the voter failed to mark the ballot as specified in the voting instructions. This memorandum confirms our advice. Please let us know if you have questions about this memorandum.

Question Presented

May the Department of Elections count a vote for a write-in candidate if it is clear that the voter intended to vote for a particular write-in candidate for a particular office, but the voter failed to mark the ballot as specified in the voting instructions (the voter failed to "connect the arrow" next to the space provided for write-in candidates)?

Summary of Advice

No. California Elections Code Section 15342(a)

specifically provides that "no write-in vote shall be counted unless the voting space next to the write-in space is marked or slotted as directed in the voting instructions." For this reason, even if the voter clearly indicates his or her choice of a write-in candidate for a particular office, the voter's failure to mark the optical scan ballot as specified in the voting system instructions invalidates the write-in vote, and the Department of Elections may not count the vote. Even prior to the adoption of Section 15342(a), the California Court of Appeal had held that write-in votes may not be counted when cast in conflict with ballot instructions, even when voter intent is reasonably clear.[1] Nonetheless, an invalid write-in vote does not invalidate the entire ballot. The Department of Elections is required to count all lawfully cast votes for candidates and measures on the ballot.

Background

Using San Francisco's optical scan voting system, voters are instructed to "complete the arrow" next to their candidate of choice and next to either the "yes" or "no" following each ballot measure. To vote for a write-in candidate, voters are

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[1]On March 22, 2004, I discussed this issue with members of the California Secretary of State's staff and they agreed with this advice. The Secretary of State's office is the agency charged with administration and enforcement of the California Elections Code. For this reason, its interpretation would be a significant factor considered by a court when determining the meaning and application of the Code. See Coca-Cola Co. v. State Board of Equalization (1945) 25 Cal.2d 918, 921; see also Andal v. Miller (1994) 28 Cal.App.4th 358, 365, note 3;

instructed to, "WRITE THE PERSON'S NAME ON THE BLANK LINE PROVIDED AND COMPLETE THE ARROW" (upper case in the original). These voting instructions are printed on each ballot card, in English, Spanish and Chinese.

In the March 2, 2004 Consolidated Primary Election, Terry Baum was a qualified writein-candidate for the Green Party's nomination for United States Congressional District 8. Ms. Baum ran unopposed. Although unopposed, Ms. Baum was required to receive at least 1,605 votes to qualify to have her name printed on the ballot for the November 2, 2004 Consolidated General election. Cal. Elections Code § 8605(a)

> no write-in candidate at a direct primary election may qualify to have his or her name printed on the ballot for the following general election unless the candidate receives votes equal to at least one percent of all votes cast for the office at the last general election at which the office was filled.

During the initial canvass of election results for the March 2, 2004 election, the Department of Elections determined that Ms. Baum received 1,430 votes.[2] At the

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[2]All information contained in this memorandum concerning the number of ballots cast in the March 2, 2004 Consolidated Primary Election is current as of today's date. These numbers may and are in fact likely to change as the Department of Elections completes its canvass of results. The Department is required to complete the canvass no later than March 30, 2004.

request of Ms. Baum, the Department then reviewed, by hand, all remaining Green Party ballots.[3] The Department determined that 229 additional voters wrote Ms. Baum's name on the ballot but did not connect the arrow next to the space for write-in candidates, as specified in the voting instructions for the City's optical scan voting system. Because these voters did not connect the arrow, the City's optical scan voting equipment could not detect that write-in votes were cast on these ballot cards.

You asked us to advise you whether the additional 229 votes are valid – whether you are required to or prohibited from counting these additional votes for Ms. Baum. If the additional votes are valid, Ms. Baum would have more than the 1,605 required to qualify to have her name printed on the ballot for the November 2, 2004 Consolidated General election.

Discussion

California law provides that votes cast in accordance with State elections laws shall be counted. Cal. Const. Art. II, § 2.5. California law further provides that, under certain circumstances when a ballot is unreadable by the vote counting and tabulating equipment, the elections official must remake the ballot to reflect and give full effect to voter intent.

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[3]In the March 2, 2004 Consolidated Primary Election, a total of 175,754 partisan ballot cards were cast in San Francisco. Of this total, only 5,509 ballots were cast by members of the Green Party. In contrast, 139,953 Democratic Party ballots and 24,472 Republican Party ballots were cast.

> when a ballot is unreadable by the voting equipment because the ballot is torn, bent or otherwise defective, the elections official shall remake the ballot "following the intention of the voter insofar as it can be ascertained from the defective ballot."

Although, as a general rule, all lawfully cast votes must be counted and certain lawfully cast but defective ballots must be remade to give full effect to voter intent, votes that are not properly cast under State elections laws are invalid and may not be counted. See, e.g., Cal. Elections Code § 15154(a)(any ballot that is not marked as provided by law, or that is marked or signed by the voter so that it can be identified by others, is invalid and shall not be counted); § 15342(c) (use of a sticker or stamp to indicate the name of a write-in candidate on the ballot is invalid, and the write-in vote shall not be counted).

State elections laws specifically provide that elections officials shall not count write-in votes if the voter fails to mark the box, arrow or other space next to the write-in candidate's name as directed in the voting instructions. Cal. Elections Code § 15342(a). This rule may seem contrary to both public policy and common sense if ballots are invalidated even though voter intent is reasonably clear. Nonetheless, Section 15342(a) appears designed to ensure the uniform treatment of write-in votes.

Specifically, Section 15342(a) appears designed to

ensure that when machines (such as the City's optical scan voting equipment) are used to count or tabulate votes, the machines can detect and record the write-in votes.4 The current voting system technology does not detect write-in votes unless the arrow is connected. In this case, because there were only 5,509 ballots cast by members of the Green Party, the Department of Elections was able to comply with Ms. Baum's request to examine every ballot by hand. As indicated in foot note 3, above, San Francisco voters cast a total of 175,754 partisan ballots in the March 2, 2004 Consolidated Primary Election. This total includes 139,953 Democratic Party ballots and 24,472 Republican Party ballots. In an election with qualified write-in candidates in multiple contests and in each political party, it would be extremely difficult if not impossible for San Francisco (and other large counties such as Los Angeles and Sacramento) to examine every ballot card by hand. By requiring that the voter cast write-in votes in a manner that can detected by the vote count and tabulation equipment, Section 15342(a) ensures that all write-in votes are treated the same – that the counting of a write-in vote is not left to chance that an elections worker might notice that a name was written on the ballot.

The California Court of Appeal recognized the need for uniform treatment of write-in votes in a case very similar to the current situation. In Fair v. Hernandez (1981) 116 Cal.App.3d 868, the court considered the validity of four write-in votes where the voters clearly indicated the name of the write-in candidate by writing it on either the front or back of San Bernardino's punch card ballot. There was no doubt as

to voter intent, but the voting system was not designed for write-in votes to be recorded on the punch card ballot. Instead, voters were instructed to record write-in votes on the secrecy envelope containing the punch card ballot. The secrecy envelope had a specially-designed section for write-in voting, and was counted and tabulated by hand. The Fair court held that the four write-in votes were invalid: "In each of these four instances the will of the voters was evident . . . .. But it is not enough to find out generally the voter's will, such will must be expressed in the manner prescribed by law." Fair, 116 Cal.App.3d at 875.

As noted above, this result may seem contrary to both public policy and common sense. Nonetheless, since the Court of Appeal issued its decision in the Fair case in 1981, the California Legislature has reaffirmed this rule and made the rule even more restrictive.

In 1994, the Legislature adopted a comprehensive revision of the California Elections Code. Included in this revision was former Section 15350, which stated:

> Any name [of a qualified write-in candidate] written upon a ballot, including a reasonable facsimile of the spelling of a name, shall be counted . . . for the office under which it is written, if it is written in the blank square therefor, *whether or not a cross (+) is stamped or made with pen or pencil in the voting square after the name so written.*

(Emphasis added.) Consistent with the ruling in *Fair*, the

Legislature explicitly stated that a write-in vote would be invalid if written in the wrong place on the ballot. Significantly, under that rule, as long as the voter recorded the write-in vote in the correct space, failure to mark the ballot according to the voting instructions would not invalidate the vote. If former Section 15350 were still in effect, our advice in this matter would be different.

In 1998, the Legislature repealed former Section 15350 and replaced it with Section 15342(a). As discussed above, Section 15342(a) explicitly states elections officials *shall not* count write-in votes if the voter fails to mark the ballot as directed in the voting instructions. San Francisco's voting instructions state: "TO VOTE FOR QUALIFIED WRITE-IN CANDIDATE, WRITE THE PERSON'S NAME ON THE BLANK LINE PROVIDED AND COMPLETE THE ARROW." For this reason, even if a voter clearly indicates his or her choice of a write-in candidate for a particular office, the voter's failure to connect the arrow as specified in the voting instructions invalidates the write-in vote, and California Elections Code section 15342(a) prohibits the Department of Elections from counting the vote.

Finally, an invalid write-in vote does not invalidate the entire ballot. The Department of Elections is required to count all *lawfully cast* votes for candidates and measures on the ballot. Cal. Const. Art. II, § 2.5.

J.A.M.

cc: Members, San Francisco Elections Commission

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ENDORSED
FILED
San Francisco County
Superior Court
July 28 2004
GORDON PARK-LI, Clerk
BY: RENE A. PASCUAL
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

TERRY BAUM,
Plaintiff,
vs.

JOHN ARNTZ,
and DOES 1-100,
Defendants.

Case No. 504-120

ORDER DENYING
ELECTION CONTEST

On July 15, 2004, this election contest came on for a hearing. Arlo H. Smith appeared for plaintiff Terry Baum and Deputy city Attorney Sherri Sokeland kaiser appeared for defendant John Arntz, Director of Elections for the City and County of San Francisco.

At issue are 229 votes that the Department of elections did not count in favor of Ms. Baum, a Green Party write-in candidate, because the voters did not write Ms. Baum's name in the space provided for write-in candidates. Unless the arrow is also connected by a mark placed by the voter, San Francisco's optical scan voting system is not alerted to the presence of the write-in vote. These 229 ballots were discovered only as a result of a hand count of all Green Party ballots.

This cases is squarely governed by California Elections Code Section 15342(a), which specifically provides that "[f]or voting systems in which write-in spaces appear directly below the list of candidates for that office and provide a voting space, no write-in vote shall be counted unless the voting space next to the write-in space is marked or slotted as directed in the voting instructions." Section 15432(a) is a mandatory provision of the California Elections Code. Section 15432(a) directed San Francisco elections officials to disregard the 229 contested ballots because they are not properly marked. Defendant and his Department simply obeyed this law.

The California Court of Appeal has also recognized the need for uniform treatment of write-in votes in a case very similar to the current situation. In *Fair v. Hernandez* (1981)

116 Cal.App.3d 868, the court considered the validity of four write-in votes where the voters clearly indicated the name of the write-in candidate by writing it on either the front or back of San Bernardino's punch-card ballot. There was no doubt as to voter intent, but the voting system was not designed for write-in votes on the secrecy envelope containing the punch card ballot. The secrecy envelope had a specifically designed section for write-in voting, and was counted and tabulated by hand. The *Fair* court held that the four write-in votes were invalid. (See *Fair*, 116 Cal.App.3d at 875.) In this case, just as in *Fair*, the general rule in favor of effectuating voter intent must give way when voters fail to follow the instructions that allow their votes to be identified and tabulated by the voting system.

Ms. Baum also challenges Section 15432(a) as an unconstitutional infringement of the right to vote. Certainly, the constitutional right to vote is fundamental. But as the United States Supreme Court has explained, not every voting is constitutionally suspect as a result:

> "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 73, 94 S.Ct. 1274, 1279, 39L.Ed.2d 714 (1974). To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitability

> affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends. Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions. (*Anderson v. Celebrezze* (1983) 460 U.S. 780, 788.)

Indeed, applying this standard, the Supreme Court has held that a state may constitutionally ban write-in voting altogether. (See *Burdick v. Takushi* (1992) 504 U.S. 428, 441; see also *Hoffman v. State Bar of California* (2003) 113 Cal.App.4th 630, 641 ["When it comes to constitutional challenges to election laws, California courts closely follow the analysis of the United States Supreme Court"].)

Where this is so, it cannot possibly offend the Constitution for Section 15432(a) to require voters to complete the arrow next to the name of the write-in candidate in the same manner they would if they were to vote for candidates whose names are pre-printed on the same ballot. Moreover, to the extent that such a ballot-marking requirement places any constitutionally cognizable burden whatsoever on the right to vote, it is amply justified by the State's need for efficient and uniform ballot tabulation.

Finally, Ms. Baum argues that the 229 disputed ballots should be given effect on the basis of substantial–even if incomplete–compliance with the voting laws. This Court is not as liberty to grant relief on that basis. (See Elec. Code § 16101; *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 192-194.)

Accordingly, the election contest is DENIED.

IT IS SO ORDERED.
July 20, 2004.

s/Ronald Evans Quidachay
HONORABLE RONALD EVANS QUIDACHAY
JUDGE OF THE SUPERIOR COURT

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

Terry Baum, Petitioner, v. THE SUPERIOR COURT OF SAN FRANCISCO COUNTY, Respondent, JOHN ARNTZ, Real Party in Interest.	FILED AUG 11 2004 Court of Appeal-First App. Dist. BY: DIANA HERBERT Deputy A107328 (San Francisco County Super. Ct. No. 504-120)

BY THE COURT:
The petition for writ of mandate/certiorari is denied.

Dated: AUG 11, 2004 s/Haerle, J. Acting P.J.

Court of Appeal, first Appellate District, Division Two -No. A107328

S127299

IN THE SUPREME COURT OF CALIFORNIA

En Banc

TERRY BAUM, petitioner,

v.

SUPERIOR COURT OF SAN FRANCISCO COUNT,
Repondent;
JOHN ARNTZ, Real Party in Interest.

Application for stay and petition for review DENIED.

SUPREME COURT
FILED
AUG 25 2004
Fredrick K. Ohlrich Clerk
Deputy

s/George. C.J.
Chief Justice